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THE EFFECT OF PRESIDENTIAL PARDONS ON DISCLOSURE OF INFORMATION: IS OUR CYNICISM JUSTIFIED?

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> *The President . . . shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.*[1]
>
> *Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.*[2]

Hamilton's conception of the pardoning power as "the benign prerogative" may seem oddly naïve to the modern reader; conventional wisdom now has it that the pardon is anything but benign. Following a string of perceived abuses of the pardon, it has become the object of widespread suspicion and cynicism. The sources of this distrust are several. To begin with, there is the apparently unchecked nature of the power. While a President may be impeached, neither Congress nor the courts can undo a pardon already granted. This raises balance of powers concerns; one commentator has noted that the pardon power gives the President the ultimate veto over criminal legislation, insofar as he can pardon everyone who is convicted under a law with which he disagrees.[3]

Then there is the perceived infrequency of its use. In recent history, most people can probably recall only President Ford's pardon of President Nixon and President Bush's pardon of six of the Iran-Contra conspirators, both of which were widely

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1. U.S. CONST. art. II, § 2.

2. THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3. *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 530 (1977). Thomas Jefferson used the pardon in such a programmatic fashion when he pardoned all those who violated the Alien and Sedition Act. *See id.*

criticized acts. Some might further remember the pardon of Jimmy Hoffa,[4] or President Carter's amnesty for those who violated selective service laws during the Vietnam War.[5] Few, however, are aware of the regularized practice of granting pardons.[6] Historically, most Presidents averaged fifty to two hundred pardons per year, though this has dropped precipitously in recent administrations.[7]

Some language by the Supreme Court may further contribute to a perception of the pardon power as a dangerous relic of the English monarchy. In *United States v. Wilson*,[8] the Court spoke of the power as an "act of grace. . . . It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended . . . ."[9] This passage was reiterated as late as 1915 in *Burdick v. United States*.[10] The language is puzzling; what does it mean that a pardon is a "private, though official, act"? In both *Wilson* and *Burdick*, the pardon is spoken of as a deed which must be accepted to have effect, almost like a gift from the President to the recipient. This talk of quasi-private action, of mixing the public and private acts of the executive, may seem anachronistic and calls into question the continued appropriateness of a pardon power vested solely in the President.[11]

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4. See Leonard Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Fardon Power been Exceeded?*, 48 U. COLO. L. REV. 1, 21-34 (1976), for a statement of facts and commentary on the Hoffa pardon.

5. *See* Proclamation Granting Pardon for Violations of the Selective Service Act, August 4, 1964-March 28, 1973, 33 CONG. Q. ALMANAC 7-E (1977); Richard A. Saliterman, *Reflections on the Presidential Clemency Fower*, 38 OKLA L. REV. 257 (1985); G. Sidney Buchanan, *The Nature of a Pardon Under the United States Constitution*, 39 OHIO ST. L.J. 36, 61-62 (1978).

6. The Department of Justice has a permanent Office of the Pardon Attorney, with staff attorneys reviewing petitions submitted pursuant to federal regulations and forwarding recommendations through the Attorney General to the President. *See* 28 C.F.R. §§ 1.1-1.10 (1998) (detailing eligibility criteria, submissions procedures, and notification requirements for pardon petitions). Although the regulations are advisory and do not restrict the President's authority to grant pardons, *see* 28 C.F.R. §1.10 (1998); Yelvington v. Presidential Pardon and Parole Attorneys, 211 F.2d 642, 643 (D.C. Cir. 1954), the recommendations of the Department of Justice are often followed.

7. President Nixon granted 926 and Carter 534, while Reagan granted only 393 during his two terms, and Bush a scant 62 in four years. *See* Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 118 n.182 (1994). President Clinton has granted 110 pardons through the end of 1998. *See* Kalpana Srinivasan, *Arkansan among Clinton's Pardons*, ASSOCIATED PRESS, Dec. 28, 1998, *available in* 1998 WL 7474529. On the decline in the incidence of pardons, see Margaret Love, *A Place for Pardons*, WASH. POST, Dec. 21, 1998, at A29.

8. 32 U.S. (7 Pet.) 150 (1833).

9. *Id.* at 160.

10. *See* Burdick v. United States, 236 U.S. 79, 89-90 (1915).

11. The nineteenth-century conception of the pardon has not gone unchallenged. Justice Holmes, for example, stated in *Biddle v. Perovich*:

> A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. . . . Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done.

The core concern of these criticisms is the fear that a President may use the pardon power to his own personal advantage. In particular, they illustrate an anxiety that a President may cover up damaging information about his administration or himself personally by a timely grant of executive clemency. By pardoning his cronies before trial, or pardoning contemnors or perjurers who impede the course of an investigation, the argument goes, a President can prevent such damaging disclosures from coming to light. A President might be especially interested in suppressing information which could lead to criminal indictment, impeachment proceedings, or even civil liability for himself. Taking this into account, the unfettered pardon power might be considered by some the most insidious power of all, since it could be used to undermine the impeachment process itself, the final check on a corrupt or abusive President.[12]

I believe this objection to the pardon power to be fundamentally misplaced. Limitations inherent in the pardon power itself, in combination with the political checks of impeachment and electoral accountability, make such abuse a remote possibility at best. Part I of this article spells out the objection to the pardoning power in greater detail, with focus on the Nixon and Iran-Contra pardons and the various calls for amendment and reform of the pardoning power. Part II answers the objection by examining alternate methods of extracting information as well as the characteristics of a pardon and political checks that inhibit its use as a device to conceal information. Part III takes a second look at the Nixon and Iran-Contra pardons, as well as speculation about various pardons Clinton could have granted during his various scandals, in light of the principles set forth in part II.

I. The Malevolence of the Benign Prerogative?

George Mason, as one of his reasons for refusing to sign the Constitution, stated that the pardoning power was too expansive, and would allow the President to pardon "those whom he had secretly instigated to commit" crimes and "thereby prevent a discovery of his own guilt."[13] Mason lost, of course; the Constitution was signed and ratified, but his views on the pardon power have gained wide currency. Paul Finkelman writes, for example, that "President Gerald R. Ford's pardon of ex-President Richard M. Nixon and President George Bush's pardon of the Iran-Contra conspirators illustrate the dangers Mason foresaw."[14] The Nixon and Iran-Contra pardons are indeed at the heart of the current disenchantment with executive clemency; speculation that President Clinton could or should have pardoned

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Biddle v. Perovich, 274 U.S. 480, 485 (1927). Still, Holmes' view has not been universally applied. The holding in *Burdick* that a pardon may be rejected remains good law, subject only to the exception carved out by *Biddle* for commutation of a sentence. *See, e.g.*, Hoffa v. Saxbe, 378 F. Supp. 1221, 1242 (D.D.C. 1974) (affirming the necessity of acceptance for validity of a pardon).

12. *See* Duker, *supra* note 3, at 525 n.258.

13. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 639 (Max Farrand ed., rev. ed. 1966) (statement of George Mason, Sept. 15, 1787).

14. Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 453 n.105 (1996) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)).

witnesses who refused to testify against him (Susan McDougal) or who may have perjured themselves (Monica Lewinsky) in assorted Clinton scandals demonstrates the ongoing nature of the controversy over executive clemency.

A. The Pardon of Richard Nixon

On September 8, 1974, President Gerald Ford granted former President Richard Nixon a "full, free and absolute pardon . . . for all offenses which he . . . has committed or may have committed or taken part in" during his presidency.[15] The pardon was the final act in the Watergate drama, which had begun over two years earlier with a bungled burglary attempt at the Democratic National Committee headquarters at the Watergate Hotel. Investigation of the matter revealed probable White House involvement in the burglary attempt, as well as a web of other burglaries, money laundering operations, and other assorted misconduct.[16] With impeachment proceedings pending, and almost certain to succeed, Nixon resigned on August 9, 1974. The pardon came a scant thirty days later, ending any chance of a criminal prosecution, at least in the eyes of Watergate special prosecutor Leon Jaworski.[17]

Reaction to the pardon was overwhelmingly critical.[18] The House Subcommittee on Criminal Justice conducted hearings concerning the propriety of the pardon, as well as its effect on the then still-ongoing Watergate investigation. One consistent theme throughout the hearings was the possibility that the pardon would prevent further information about Watergate from coming to light. For example, Rep. John Bingham (D.-N.Y.) explained that

> [m]llions of people are outraged by the pardon not simply because it seems to prevent Nixon from being summoned before a court to answer for his conduct, but because it might forever protect the full story of the Nixon administration's violations of the law and the Constitution from full disclosure. . . . The American people still do not have all the facts about the Nixon Administration's misconduct, and without those facts we cannot know their true magnitude and significance.[19]

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15. Proclamation No. 4311, 39 Fed. Reg. 32,601, 32,601-02 (1974).

16. *See generally* Hugh C. Macgill, *The Nixon Pardon: Limits on the Benign Prerogative*, 7 CONN. L. REV. 56 (1974).

17. *See id.* at 88. Although Jaworski did not press the issue, a number of other writers at the time contended that the pardon was unconstitutional for various reasons, and that Nixon could in fact be prosecuted. Rep. John Bingham (D.-N.Y.) recognized that the pardon would not bar an indictment against Nixon, because a pardon has to be affirmatively pled to bar prosecution, and indictment comes before pleading. He in fact advocated indicting Nixon as a means of challenging the constitutionality of the pardon. *See Pardon of Richard M. Nixon, and Related Matters: Hearings Before the House Subcommittee on Criminal Justice*, 93d Cong. 54-55 (1975) (statement of Rep. John Bingham) [hereinafter *Hearings*]. For a review of the arguments against the constitutionality of Nixon's pardon, see Macgill, *supra* note 16.

18. Indeed, there is general agreement that the pardon played a significant role in Ford's 1976 electoral defeat. *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 617 (1991).

19. *Hearings*, *supra* note 17, at 57.

Bingham went on to note that even full disclosure of the Special Prosecutor's findings would not allay his concerns, since the investigation had not yet reached all allegations of misconduct, and Jaworski had not yet accessed much key evidence, including the Nixon tapes and the testimony of Richard Nixon himself.[20] Rep. William Hungate (D.-Mo.) echoed much the same sentiment: "Unless the complete story of Watergate is known, history may incorrectly record the events of these times. . . . The Congress has dealt responsibly with Watergate, but Watergate will not be behind us until the record of Watergate is complete."[21]

Professor Hugh Macgill also worried about the opportunity for Nixon to use the pardon to suppress information and argued for its invalidation. Macgill believed that, "[t]o the extent that more definite knowledge of Mr. Nixon's conduct in office, through indictment or prosecution, would be a necessary purgative for the Republic, the pardon should be set aside."[22] In addition to the damage done to the Watergate investigation, Macgill was concerned that the vagueness and breadth of the pardon, which covered all crimes Nixon committed or might have committed during his presidency, might have "seriously impeded significant aspects of investigations conducted by the Special Prosecutor's office, particularly in areas unrelated to Watergate, which were not scrutinized in the cover-up conspiracy trial . . . ."[23]

The need to firmly establish a record of the Watergate conspiracy for historical reasons also impelled Judge Sirica, who presided over many of the Watergate cases over the course of five years, to reflect negatively on the pardon:

> [N]o matter how long it took, [Nixon] should have stood trial. . . . After a trial, after the best prosecution case possible had been presented, after the best defense had been offered, after testimony and cross-examination *under oath* had been completed, a final verdict would have put the president's guilt or innocence beyond dispute. No one then could wonder whether or not he had done wrong. No one, not even Nixon himself, could any longer argue that his fate was the product of politics rather then the result of justice being served.[24]

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20. *See id.* at 58. Interestingly, Special Prosecutor Leon Jaworski himself had a contrary view, approving of the pardon and arguing that a trial of Richard Nixon would have added very little to the historical record, since Nixon could have invoked the Fifth Amendment, or pled nolo contendre or guilty. *See* Karen Elliott, *The Pardon of Nixon was Timely, Legal, Jaworski Believes*, WALL ST. J., Oct. 16, 1974, at 1.

21. *Hearings*, *supra* note 17, at 1.

22. Macgill, *supra* note 16, at 91. Somewhat inconsistently, Macgill also recognized the possibility that impeachment proceedings could have continued despite Nixon's resignation, and that such proceedings would have been one way for Congress to pursue the investigation notwithstanding the pardon, had it so chosen. *See id.* at 62.

23. *Id.* at 91-92. Nixon's pardon was nonspecific, covering "all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974." Proclamation No. 4311, 39 Fed. Reg. 32,601 (1974). Professor Duker wrote that there was a "reasonable doubt" as to the constitutionality of the pardon because of its vagueness. *See* Duker, *supra* note 3, at 532.

24. JOHN J. SIRICA, TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON 234-35 (1979).

I.F. Stone argued that the pardon was invalid because it violated the impeachment exception to the pardon power.[25] Insofar as Nixon's resignation prevented such investigation by means of impeachment proceedings, he claimed, only criminal prosecution would have resulted in a full investigation into Nixon's misconduct.[26] Because the pardon blocked criminal prosecution, Stone concluded, Nixon's pardon violated the purpose of the impeachment exception as a device to prevent the President from blocking legislative investigation into executive misconduct.[27] William Duker joined the chorus of anti-pardon sentiment, expressing concerns that a President, "liable to impeachment for a reason other than abusive use of the pardon, could, via the power, suppress a thorough investigation."[28]

What is interesting about these criticisms is that they are not about justice — whether Nixon should ultimately have been held criminally liable for his misconduct and punished — but about information. Arguably, the bulk of the critical commentary on the Nixon pardon focuses on the "informational harm" supposedly facilitated by the pardon. What I refer to as informational harm is a group of at least three closely related injuries to society when information is withheld or concealed. First, there is the immediate danger that pardoning one offender will hamper investigation of other offenders, or other offenses by the same individual; this was one of Macgill's worries. Second, there is the possibility that a practice of pardoning high level executive officials will erode disincentives on official misconduct. The supposed danger is not just that officials who commit crimes need not fear punishment, but also that they need not fear the disgrace of having their misdeeds publically exposed. Finally, there is a more general, long-term injury inflicted upon democratic discourse when information is withheld and the historical record is distorted. This is the thrust of Judge Sirica's criticism, as well as Congressmen Bingham and Hungate's remarks.

B. The Iran-Contra Pardons

On December 24, 1992, outgoing President Bush granted Christmas Eve pardons to former Secretary of Defense Caspar Weinberger and five other conspirators in the Iran-Contra affair. The conspiracy centered around covert weapons sales to Iran, made in the hopes of obtaining the release of American hostages in Lebanon. Profits from these sales were funneled to the Contra rebels in Nicaragua, in contravention of explicit congressional directives.[29] The pardons came in the midst of an ongoing investigation of the affair headed by special prosecutor Lawrence Walsh, who had already obtained eleven convictions in the six-year-long inves-

25. *See* I.F. Stone, *On Pardons and Testimony*, N.Y. TIMES, Oct. 9, 1974, at 43.

26. Stone's argument seems in this respect flawed, since impeachment proceedings could have been commenced even after Nixon's resignation in order to deprive him of his pension and entitlements. *See* Macgill, *supra* note 16, at 61-62.

27. *See* Stone, *supra* note 25.

28. Duker, *supra* note 3, at 525 n.258.

29. See James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 362-64 (1993), for a concise summary of the events surrounding the Iran-Contra scandal.

tigation.[30] Five of the pardons went to individuals who had already been convicted, but Weinberger's trial was still to come, and had been scheduled to begin on January 5, 1993 — a mere two weeks after his pardon.

Walsh's reaction to the pardons was indignant. With the trial about to begin, Walsh believed that the pardon was granted to prevent disclosure of Bush's role in the scandal. As he later explained, "[t]he full extent of Bush's guidance of President Reagan had not yet been adequately explored — by me or by Congress. . . . The only way for him to avoid the revelations that would emerge at Weinberger's trial would be to pardon Weinberger before the case went to trial."[31] Defense counsel for Weinberger had indeed stated that they would call Bush to testify at the trial.[32] Even if Bush was not called to the witness stand, there was the chance that Weinberger's own testimony would have proven embarrassing to Bush, or even led to his indictment.

While there was brief discussion of calling Weinberger to testify before a grand jury, there was a general consensus that by putting an end to Weinberger's prosecution, Bush had also ended any realistic hope that Walsh or anybody else would obtain accurate testimony from him.[33] Walsh stated bluntly that "[t]he Iran-Contra coverup . . . has now been completed with the pardon of Caspar Weinberger," and that the pardon had "a devastating effect on the development of further facets of the inquiry . . . ."[34] Apparently deprived of the key information expected to come to light during Weinberger's trial, Walsh closed his investigation shortly after the pardon.[35]

Many critics of the pardon agreed with Walsh that Bush's primary motivation for granting it was to conceal his own role in the affair. A CNN-USA Today-Gallup poll conducted shortly after the pardon found that half of those who had followed the news believed that Bush's motive had been "to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-Contra."[36] Professor Harold Koh wrote that the prosecution "would have answered, or at least cast light upon," the critical question of Bush's "constitutional fidelity."[37] Professor Laurence Tribe stated that the framers "did not intend the power to pardon to enable a President to cover his own tracks,"[38] but concluded somewhat helplessly that the pardon "definitely represents a significant abuse of presidential power, but not the kind of abuse our system has provided any remedy for. It's just a disgrace. That's all."[39] James Jorgensen worried about the danger that concealing information

30. *See id.* at 364.
31. LAWRENCE WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 467 (1997).
32. *See id.* at 487.
33. *See* Saul Friedman, *Pardon Pirouette: Walsh to Drop Iran-contra Prosecutions*, NEWSDAY, Dec. 31, 1992, at 7.
34. Jorgensen, *supra* note 29, at 366.
35. *See* Friedman, *supra* note 33, at 7.
36. WALSH, *supra* note 31, at 504.
37. Harold H. Koh, *Begging Bush's Pardon*, 29 HOUS. L. REV. 889, 890 (1992).
38. WALSH, *supra* note 31, at 507-08.
39. *Id.*

"deprives the public and other branches of government of the opportunity to hold their government accountable."[40] Commentator Garry Wills, perhaps recalling Stone's argument following Watergate, analyzed the pardon in balance of powers terms, suggesting that the concealment of information by means of the pardon violated the spirit, if not the letter, of the constitutional bar on pardons of impeachment, insofar as it impeded Congress' duty to "police and, if necessary, punish the behavior of the other departments" through impeachment proceedings.[41] Without belaboring the point any further, it is clear that the same sort of concerns about informational harm that were voiced after Nixon's pardon — interference with other investigations, erosion of disincentives against executive misconduct, withholding of information from the public, and distortion of the historical record — are prominent in commentary about the Iran-Contra pardons.

C. The Clinton Capers

President Clinton weathered the storm of controversy surrounding the Whitewater and Lewinsky scandals without employing the pardon power to his advantage. This was not for lack of opportunity. While Susan McDougal was serving an eighteen-month sentence for civil contempt for her refusal to answer certain questions about the Clinton's real estate affairs before a grand jury, there was widespread speculation that the President would reward her loyalty with a pardon. While Clinton never commented on a pardon for McDougal, when asked pointedly about the possibility, he refused to rule it out.[42]

There were also hints that Clinton could use the pardon power to hamper special prosecutor Kenneth Starr's investigation into the Monica Lewinsky scandal. For example, Terry Eastland argued that Clinton could have seriously impeded the investigation in the following manner:

> [u]sing the pardon power, Clinton could insulate his friend Vernon Jordan and other targets of Starr's probe. He could also nullify the prosecution of Susan McDougal, who remains in jail for contempt for her refusal to testify about the Clintons. . . . Though pardons would not put Starr out of business, they would subtract from his investigation significantly.[43]

Others advocated that Clinton grant a pardon to Monica Lewinsky herself. Andrew Shapiro cynically proposed that Clinton should have pardoned her in order to silence her as a witness, thereby putting an end to Starr's inquiries.[44] "[I]f Clinton pardoned her," he maintained, "she wouldn't have to tell Starr a thing."[45] If she had been pardoned, the argument goes, Starr would have lost the promise of

40. Jorgensen, *supra* note 29, at 367.

41. Garry Wills, *Bush's Shameless Finale; The Pardons Undermine Constitutional Intent*, WASH. POST, Dec. 27, 1992, at C1.

42. *See Pardon Possibility Raises Storm*, MILWAUKEE J. & SENTINEL, Sep. 25, 1996, at 8.

43. Terry Eastland, *Shooting Starr*, WKLY. STANDARD, Feb. 9, 1998, at 14.

44. *See* Andrew L. Shapiro, *Pardon Her*, NEW REPUBLIC, Mar. 2, 1998, at 11.

45. *Id.*

immunity as a bargaining chip, and with it any hope of extracting useful information from her, especially since he would have been barred from prosecuting Lewinsky for any underlying offenses she might have committed, such as perjury or coercing a government employee to lie under oath.[46]

Finally, others suggested that Clinton might actually pardon himself for any misdeeds he may have committed, or speculated about a pardon from Vice-President Al Gore should Clinton have resigned or faced charges after his term of office had elapsed.[47] Of course, none of these speculative pardons ever came to fruition, but the commentary surrounding them reinforces the notion of the pardon power as a tool which a President can use to suppress information.

D. Calls for Reform

Not surprisingly, both the Nixon and Iran-Contra pardons were followed by a flurry of suggestions concerning how to prevent future abuses of the pardon power. After Nixon's pardon, at least two serious proposals for constitutional amendments were raised in the Senate. Sen. William Proxmire (D.-Wis.) suggested that pardons be limited to persons already convicted.[48] Ironically, the founders rejected such a provision because they thought that pre-conviction pardons would be an aid to investigations, in that they might be used to encourage the cooperation of accomplices.[49] In any case, the proposal is revealing. Since the only significant difference between a pre-trial pardon and a post-conviction pardon is the trial itself, and any testimony or evidence that may be brought to light during trial, the proposal is clearly focused on remedying the supposed problem of suppressed disclosures. Sen. Walter Mondale (D.-Minn.) proposed an even more sweeping amendment, which would have granted Congress the power to nullify a pardon within 180 days of its issuance by a majority of two-thirds of each House.[50] William Duker, seeking to "rid the pardoning power of its apprehensible novelty," endorsed Mondale's proposal in his important article on the constitutional history of the pardon power.[51]

In reaction to the Iran-Contra pardons, James Jorgensen renewed the call to limit the pardon power by allowing pardons only after indictment, trial, and conviction, and additionally proposed a requirement that the President specify which crimes are being pardoned.[52] Lawrence Walsh stopped short of suggesting a constitutional

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46. *See id.*

47. *See, e.g.*, C. Boyden Gray, *The Difficulty of Doing a Deal*, WALL ST. J., Sep. 28, 1998 (speculating on the possibility of Gore granting Clinton a pardon, or even Clinton pardoning himself).

48. *See* S.J. Res. 239, 93d Cong. (1974).

49. *See* Jorgensen, *supra* note 29, at 368 n.163. The Supreme Court has stated, albeit in dicta, that pardons may be granted before conviction. *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867). See also Macgill, *supra* note 16, at 64-74, for a thorough discussion of the validity of pre-conviction pardons.

50. *See* S.J. Res. 240, 93d Cong. (1974).

51. Duker, *supra* note 3, at 535-38.

52. *See* Jorgensen, *supra* note 29, at 368-70. There is some suggestion that specificity is already required in grants of pardon. *See* Macgill, *supra* note 16, at 74-85; Boudin, *supra* note 4, at 34-36.

amendment, but did advise that the public should at least extract promises from presidential candidates that they would not grant any pardons before conviction.[53]

While none of these proposals were ultimately adopted, cynicism about the pardon power continues. As we have seen, Kenneth Starr's investigation of President Clinton has led to another round of commentary about the abusive nature of the power. Before accepting this analysis, however, the purported link between pardons and informational harm should be scrutinized more closely.

II. Limitations on the President's Power to Conceal Information through the Pardon Power

There are two groups of reasons why the pardon power will not operate to prevent disclosure of information. The first is a set of internal limitations on the pardon power itself. There are restrictions on what offenses are pardonable. A pardon can not be granted prospectively, for an offense not yet committed, and civil contempt of court, and probably contempt of Congress are not pardonable offenses. There are also limitations on the effect of a pardon once granted. For example, a pardon will not remove any nonpunitive consequences of having committed an offense, such as disbarment. The second group of restraints on the pardon power are political in nature — reasons why a President will not exercise what is within his power. A President who abuses the pardon risks impeachment, even after he leaves office, or at a minimum may suffer at the polls. Finally, the fact that a pardon abrogates a witness' Fifth Amendment privilege against self-incrimination makes pardon a two-edged sword. In this section, I will review each of these factors in turn and analyze their impact on the potential for use of the pardon to prevent disclosure of information.

A. Pardon May Only Be Granted for Offenses Already Committed

The fact that a pardon cannot be granted prospectively, but instead only for an offense already committed, limits the President's power to cover up damaging information. Before explaining how this is so, an examination of the basis for the rule against pre-commission pardons is warranted.

At first glance, it seems commonsensical that the President can only pardon offenses already committed, and many have taken the proposition to be self-evident.[54] Yet, this rule does not follow inexorably from the text of the Constitution, which simply grants the President the power to "grant Reprieves and Pardons for Offenses against the United States,"[55] without any temporal restriction. Some have argued that such a rule is necessary to prevent "dispensing with the

53. *See* Lawrence E. Walsh, *Political Oversight, the Rule of Law, and Iran-Contra*, 42 CLEV. ST. L. REV. 587, 596 (1994).

54. *See, e.g., Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867) (finding the pardon may be exercised at any time after commission of offense); Pardoning Power, 11 Op. U.S. Att'y Gen. 227, 229 (1865) ("As a pardon presupposes that an offence has been committed, and ever acts upon the past, the power to grant it never can be exerted as an immunity or license for future misdoing.").

55. U.S. CONST. art. II, § 2, cl. 1.

compulsive effect of statutes, or of the law generally."[56] This is an unconvincing rationale, however, for the President could just as easily undermine a statute by pardoning all offenders after the fact as he could by granting pardons before commission of the offense.[57] A second possible rationale, offered by Attorney General Cushing, sounds in the doctrine of separation of powers:

> [T]he power of pardoning is granted upon a special confidence that the administrator of it will spare only those from punishment, whose case, could it have been foreseen, the legislature may be presumed willing to have excepted out of the general rules, which the wisdom of man cannot possibly make so perfect as to suit the particular circumstances of each special case.[58]

Cushing's argument supposes that the role of determining laws of general applicability belongs exclusively to the legislature, with the executive pardon power reserved only for instances unusual enough that the legislature could not have accounted for them. But this interpretation does not adequately account for the President's power to grant amnesties, which are essentially grants of pardon to a broad class of individuals, whose eligibility is determined by general rules, not specific exceptions. Furthermore, if one accepts that a President is able to discern after an offense has been committed that a special exception to the laws was warranted, surely he is equally able to determine in advance that such an exception will be warranted, if presented with the relevant facts. Circumstances that the legislature may not have foreseen can arise at any time after a statute is passed; it does not require actual commission of an offense to perceive that there should be an exception in a certain case.

A better argument against allowing pre-commission pardons is that it limits potential abuse by a President to his term in office. If pre-commission pardons were valid, then an outgoing President — especially one under threat of impeachment or otherwise leaving in disgrace — could immunize misconduct taking place after he leaves office. A corrupt President could license his cronies to violate federal laws for the rest of their lives, while Congress and subsequent Presidents would be powerless to prevent such corruption.

The Supreme Court has twice stated in dicta that pardons can only be granted for offenses already committed. The cases are *Ex parte Garland*[59] and *Ex parte Grossman*,[60] and neither contains much in the way of elaboration. However, their

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56. JOHN POMEROY, CONSTITUTIONAL LAW 573 (Edmund H. Bennett ed., Houghton, Mifflin 1886) (1868); *see also* W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 63 (1941).

57. *See* Duker, *supra* note 3, at 53 (noting Jefferson's use of the pardon to undermine the Alien & Sedition Act).

58. Passenger Laws — Pardoning Power, 6 Op. Att'y Gen. 393, 403 (1854).

59. *Garland*, 71 U.S. (4 Wall.) at 380 (stating a pardon may be exercised any time after commission of offense).

60. *Ex parte* Grossman, 267 U.S. 87, 121 (1925) ("[A] pardon can only be granted for a [criminal] contempt fully completed."). More interesting is the debate over whether a pardon can be granted before conviction. Thirty-eight of the state constitutions explicitly limit the pardon power by providing that it

interpretation of the pardon power is much in line with English practice at the time the Constitution was adopted. At one time, the English king had asserted the prerogative of granting "promissory pardons," but that practice had ended long before the framing of the Constitution.[61] A prospective pardon would be analogous to the medieval English monarch's power of dispensation, whereby the King could grant an individual permission to disobey a statute.[62] This power, which had always been confined to the "laws of man" (*mala prohibita*, or regulatory laws), as opposed to the "laws of God" (*malum in se*, or natural laws), was further restricted by the English Bill of Rights, which allowed dispensations to be granted only if specifically authorized by the relevant statute.[63] The framers were well aware of the lexical distinction between pardon and dispensation, and their failure to include an executive dispensation power is evidence that they did not intend the pardon power to operate in this manner. Based on this history, as well as the need to limit possible presidential abuse and the lack of a single instance of a pre-commission pardon in the United States, it may be regarded as settled that pardons can only be granted after commission of an offense.

The consequences of this limitation hamper the President's ability to impede investigations, since the pardon of any offense does not encompass any subsequent commission of perjury or contempt. Suppose, for example, that a U.S. Army officer sells arms in violation of an act of Congress, and is subsequently pardoned for this offense. If he is then called to testify by a grand jury regarding his activities, any perjury or contempt that he may commit in the course of testifying would fall outside the scope of the pardon, having been committed subsequent to the pardon itself.

To truly complete the coverup, the President could always grant a second pardon. Successively issued pardons could effectively counter repeated perjury convictions or criminal contempt citations so long as the President remains in office. But by forcing him to make a series of pardons to protect his witness, the bar against pre-commission pardons compels the President to make his motivations explicit. Consider the Iran-Contra affair; President Bush justified the pardons primarily on the grounds that the officials had acted with "honor, decency, and fairness," that they had distinguished records of service, that they did not profit personally by their actions, and that they were being punished for policy differences within the

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may only be used after conviction. *See* 3 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 142-43 (1939) [hereinafter SURVEY OF RELEASE PROCEDURES: PARDON]. While pre-conviction pardons are rare, their acceptability is implied in both *Grossman* and *Garland*. Notwithstanding, Philip Kurland suggested that Ford's pardon of Nixon was invalid because it was granted before conviction. *See* Philip Kurland, N.Y. TIMES, Sep. 13, 1974, at 1. For a comprehensive discussion of the issue, concluding that pre-conviction pardons are permissible, see Macgill, *supra* note 16, at 64-74.

61. POMEROY, *supra* note 56, at 573; SURVEY OF RELEASE PROCEDURES: PARDON, *supra* note 60, at 143.

62. *See* 6 SIR WILLIAM HOLDSWORTH, HISTORY OF LAWS OF ENGLAND 217-18 (1924) (2d ed. 1936).

63. *Id.* at 240-41.

administration.[64] None of these reasons, even if they justified pardon for the underlying offenses, could plausibly justify a second or successive pardon for perjury or contempt. In such a case, the President's objective to conceal information would be demonstrated unequivocally by the second pardon. The perceived illegitimacy of a pardon for perjury in a political case such as the Iran-Contra affair would only be amplified if the President had to issue a consecutive series of pardons for perjury. The flagrant use of the pardon power to conceal information, without any plausible alternative justification, would likely provoke calls for impeachment, and would probably irreparably injure any prospects for reelection.[65]

Even in the case of successive pardons, a President can only protect a witness while he holds office. The ban against pre-commission pardons ensures that a President will not be able to hinder an investigation that takes place after he has left office. Thus, even without any of the other checks discussed in this piece, the worst a President could accomplish without the active assistance of his successors in office would be to delay an investigation for several years. The exclusively retroactive nature of the pardon power thus limits a President to acting within his own term, and by forcing him to grant consecutive pardons to shield ongoing instances of perjury or contempt, compels him to reveal his true motivations to conceal information.

B. Civil Contempt Is Not a Pardonable Offense

Although a pardon blocks criminal prosecution of a witness to presidential misconduct, the possibility of calling the witness to testify in another's criminal trial or before a grand jury to determine whether others should be indicted remains a viable means of extracting information. Furthermore, where the circumstances are such that a private party is able to assert a civil cause of action (as in the Paula Jones case), the full coercive power of the courts stands behind the private litigant to force witnesses with relevant knowledge to cooperate. If a person refuses to testify or cooperate in discovery, she can, of course, be held in contempt of court.[66] Because civil contempt of court are not pardonable offenses under current constitutional doctrine, there is little a President can do to interfere with the process of discovery and the taking of testimony either in civil cases or before a grand jury.

Courts generally draw a distinction in purpose and effect between criminal and civil contempts. The distinction has nothing to do with whether the case itself is

64. Jorgensen, *supra* note 29, at 362-65.

65. *See* Kobil, *supra* note 18, at 598 n.182 (arguing a President runs the risk of impeachment for obstructionist use of the pardon power).

66. *See, e.g.*, FED. R. CIV. P. 37(b)(1) (providing failure to be sworn or to answer questions in a deposition after being so directed by a court may be considered contempt); FED. R. CIV. P. 37(b)(2)(D) (allowing the court to treat as contempt any failure to obey certain disclosure or discovery orders). Section 17 of the Federal Judiciary Act of 1789 granted federal courts broad statutory powers of contempt, Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 83 (1789), although the Supreme Court has held that this provision merely restates what would have been within the power of the courts in any event. The power of contempt is inherent in the judiciary and requires no specific authorization. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

criminal or civil; rather, it relates to the function of the contempt citation itself and the type of sanction imposed. The Supreme Court articulated the core difference in *Gompers v. Bucks Stove and Range Co.*:[67]

> It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal the sentence is punitive, to vindicate the authority of the court.[68]

Thus, a civil contempt is coercive, designed to force the offender to comply with a court order, whereas a criminal contempt is strictly punitive in nature.[69] An indeterminate penalty, such as imprisonment or a daily fine until compliance is obtained, is indicative of a civil contempt. The civil contemnor, it is said, "carries the keys of his prison in his own pocket."[70] The typical punishment for criminal contempt, conversely, is a determinate sentence of imprisonment or a fine. As an alternate characterization, the *Gompers* Court also drew a distinction between "refusing to do an act commanded," which constitutes a civil contempt, and "doing an act forbidden," which constitutes a criminal contempt.[71]

The difference between civil and criminal contempt is sometimes obscure and has been widely criticized in academic literature.[72] To begin with, most findings of contempt combine coercive and punitive goals. As the Court in *Gompers* conceded:

> [I]f the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience.[73]

The Court nevertheless defends the distinction by trying to identify the primary function of a particular contempt citation. However, as Phillip Hostak has noted in his critique of contempt doctrine, identification of the "primary" function of an order which has both coercive and punitive qualities takes on a certain *a priori* character.[74] Nevertheless, courts have thus far adhered to the basic *Gompers* framework.[75]

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67. 221 U.S. 418 (1911).

68. *Gompers*, 221 U.S. at 441.

69. *See* C.H. THOMAS, PROBLEMS OF CONTEMPT OF COURT 2 (1934).

70. *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902).

71. *Gompers*, 221 U.S. at 443.

72. For a particularly thorough critique, see Philip Hostak, Note, International Union, United Mine Workers v. Bagwell: *A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181 (1995). *See also* Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943).

73. *Gompers*, 221 U.S. at 443.

74. *See* Hostak, *supra* note 72, at 199-200.

75. *See, e.g.*, Shillitani v. United States, 384 U.S. 364, 372 (1966) (finding a two-year prison term for refusal to answer questions posed by grand jury to be civil contempt, where contemnor could relieve

Turning now to the question of pardons, the United States Supreme Court held in *Grossman* that a President's pardon power extended to criminal contempt, but strongly suggested in dicta that it did not encompass civil contempt.[76] In finding that criminal contempt is a pardonable offense, the Court drew upon English common law at the time of the framing of the Constitution.[77] Reasoning that the English monarch's pardon power extended to criminal contempt, the Court found that a similar construction must be given to the Constitution's grant of pardon power to the President.[78] In so doing, the Court rejected the argument that separation of powers prohibited executive interference in a court's enforcement of its orders through contempt, and that allowing pardons would be too great a usurpation of the judiciary's authority. Chief Justice Taft was dismissive of this objection:

> If it be said that the President, by successive pardons of constantly recurring contempt in particular litigation, might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.[79]

In addition to pointing out the possibility of impeachment, Taft argued that judicial abuse of the contempt power was a more serious concern than executive abuse of the pardon power, since many of the protections of the Bill of Rights, including the right to a jury trial, did not apply to contempt proceedings at that time.[80]

The *Grossman* decision has hardly escaped criticism.[81] But whatever one's view of the holding on criminal contempt, the Court was on firm ground when it stated in dicta that, "[f]or civil contempt the punishment is remedial and for the benefit of

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himself of punishment by agreeing to testify); *In re* Borough of West Wildwood, 42 N.J. Super. 282, 285 (1956) (utilizing the *Gompers* test to distinguish between daily fines against a borough for violating an injunction as civil contempt and one-time fines against particular officials as criminal contempt); *cf.* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 833-34 (1994) (adhering to civil-criminal distinction for contempts and finding out-of-court violations of complex injunctions are criminal contempts because the complex evidentiary questions posed by such cases necessitate criminal procedure-type protections).

76. *See Ex parte* Grossman, 267 U.S. 87, 121 (1925).

77. *See id.* at 108-09.

78. *See id.* at 109-13.

79. *Id.* at 121.

80. *See id.* at 122. Today, most criminal procedural safeguards do apply to contempt proceedings, although the right to indictment by a grand jury still does not apply, and the right against double jeopardy has been held not to bar an action for criminal contempt notwithstanding prior proceedings for civil contempt. *See* Hostak, *supra* note 72, at 185.

81. The most persuasive contemporary critique is offered by Rice Larder, *Executive Pardon for Contempt of Court*, 2 ROCKY MTN. L. REV. 137, 151 (1930). C.H. Thomas provides a defense of the holding on the ground that pardon is necessary to curb excesses of the judiciary. *See* THOMAS, *supra* note 69, at 92-93.

the complainant, and a pardon cannot stop it."[82] Again, common law history supports this assertion, since the English King could not pardon civil contempt at the time of the framing of the Constitution.[83] The basis for both the English rule and its continued practice in America is that allowing a pardon for civil contempt would interfere with the civil litigation process to such an extent as to deprive a litigant of the legal right being asserted in the suit.

The principle that a pardon cannot compromise interests or rights which have vested in a third party is widely accepted. As early as the thirteenth century, Bracton commented on the King's prerogative of "inlawry," or restoring the protections of the law to one who had been "outlawed," that

> [t]he King cannot grant grace if it is to the harm and damage of others. He may give what is his own, that is his peace, which the outlaw lost by his flight and his contumacy, but by his grace he cannot give what belongs to another.[84]

This basic premise was followed in American practice. By its terms, the pardon power is limited to "offenses against the United States."[85] This clearly excludes pardoning defendants in civil suits between private parties in which the United States has no interest.[86] In a similar vein, even a pardon granted for an offense against the United States will not have the effect of restoring rights or property which have already vested in a third party. For example, in *Knote v. United States*,[87] the Court ruled that a pardon did not restore property which had been confiscated and sold during the Civil War.[88] The Court stated:

> Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon.[89]

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82. *Grossman*, 267 U.S. at 111.

83. The Attorney General's argument in *Grossman* suggested that the King could at one time pardon civil contempts, but by the time of the framing of the Constitution this was no longer the case, citing a number of cases as well as Blackstone for the proposition that a pardon cannot infringe upon the rights of others. *See id.* at 103.

84. 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 373 (George Edward Woodbine ed., Harvard Univ. Press 1968) (1883).

85. U.S. CONST. art. II, § 2.

86. *See* Western Union Tel. Co. v. Ferguson, 60 N.E. 679 (Ind. 1901); HUMBERT, *supra* note 56, at 54. The President may only remit criminal fines or forfeitures pursuant to the pardon power if they accrue to the United States, but not if they are directed to a third party (typically the victim, captor, or prize crew). *See* Osborn v. United States, 91 U.S. 474, 476 (1875); Pardoning Power of the President, 16 Op. Att'y Gen. 1 (1878); Effect of Pardons, 8 Op. Att'y Gen. 281 (1857); Pardon — Restitution of Fine, 5 Op. Att'y Gen. 532 (1852).

87. 95 U.S. 149 (1877).

88. *Id.* at 154-55.

89. *Id.* at 154.

So, the *Grossman* Court's statement that a pardon cannot "interfere with the use of coercive measures to enforce a suitor's right" seems correct.[90] The same conclusion has been reached by all state courts that have considered the matter,[91] and is universally accepted in academic literature.[92]

In light of these precedents, it is apparent that the President could not pardon a recalcitrant witness who, refusing to testify or to turn over certain documents, is found in contempt of court. If the contempt is civil in nature, as surely it would be,[93] with an indeterminate penalty designed to force compliance with the court's order, then a pardon would be of no use to the contemnor. Even if the contempt is criminal, and a President grants a pardon, double jeopardy does not bar a subsequent citation for civil contempt. Thus, ultimate coercive power to obtain testimony remains with the courts.[94]

It might be argued that a recalcitrant witness, informed by clever legal counsel, would actively perjure herself or destroy documents, rather than just refuse to testify or cooperate. Subsequent perjury or obstruction of justice charges, as statutory federal crimes, would clearly be pardonable offenses. Still, a contempt citation might follow in addition to the perjury charges. Although perjury is not necessarily an act for which one can be held in contempt, if the perjury tends to obstruct the proper functioning of the court — as it almost always will — then a contempt citation is proper.[95] In any case, it is easier to publicly justify refusal to cooperate with an investigation than to justify actively lying under oath. Furthermore, the necessity of issuing successive pardons to protect a witness who successively perjures herself makes this hypothetical politically highly improbable.[96]

The threat of contempt will not, of course, always guarantee forthright, truthful answers. Some witnesses will opt to suffer the penalties of contempt, or gamble that the opposing party will be unable to expose their evasiveness or perjury. But the point is that a President's pardon power has little impact on a witness' decision-

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90. *Grossman*, 267 U.S. at 121.

91. *See* People v. Peters, 137 N.E. 118 (Ill. 1922); State v. Verage, 187 N.W. 830 (Wis. 1922); Hutton v. McCleskey, 200 S.W. 1032 (Ark. 1918); *Ex parte* Brown, 2 Colo. 553 (1875).

92. *See, e.g.*, SURVEY OF RELEASE PROCEDURES: PARDON, *supra* note 60, at 140; HUMBERT, *supra* note 56, at 61; THOMAS, *supra* note 69, at 76; Lawrence N. Gray, *Contempt!*, 69 N.Y. ST. B.J. 22, 25 (1997).

93. *See* Shillitani v. United States, 384 U.S. 364 (1966). Interesting in this respect is Judge Susan Webber Wright's recent holding of President Clinton in civil contempt of court for his evasive testimony during the Paula Jones case. Jones v. Clinton, 36 F. Supp. 2d 1118 (E.D. Ark. 1999) (No. LR-C-94-290) *available in* 1999 WL 202909. Even if presidential self-pardons are constitutionally permissible — a dubious proposition, *see* Brian Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 798-99 (1996) — Clinton would be barred from pardoning himself for this contempt citation by virtue of its remedial function as a civil contempt. *See Jones*, 1999 WL 202909, at *14-*15.

94. *See* Hostak, *supra* note 72, at 185.

95. *See Ex parte* Hudgings, 249 U.S. 378, 383 (1919) (finding perjury punishable as contempt only when it obstructs the functioning of the court); Stephen L. Braga, *"Of All Liars, the Smoothest and Most Convincing Is Memory": A Critique of the Application of the Recalcitrant Witness Statute to the Nonrecalling Witness*, 21 AM. CRIM. L. REV. 425, 442-43 (1984).

96. *See supra* notes 54-65 and accompanying text.

making calculus when called to testify before a grand jury or in an associated criminal or civil trial. Whether or not any underlying offense has been pardoned, the witness remains compelled to answer questions in all of these settings, a compulsion that is not removed by the pardon power.

C. Contempt of Congress Is Probably Not a Pardonable Offense

In order to make intelligent, informed legislative choices, Congress must have access to information. Usually, witnesses are forthcoming with testimony before Congress. For a variety of reasons, however, some witnesses may refuse to provide information that Congress deems essential to reaching an informed decision. In these instances, it is vital that Congress have the ability to compel testimony if it is to successfully fulfill its constitutionally assigned responsibilities. Following this logic, the Supreme Court has found that the power to compel attendance and testimony, and to punish violations of its orders, are inherent powers of Congress.[97]

If the contempt power is an essential foundation for the exercise of all of Congress' other powers, then it would be troubling to discover that a President could interfere with this power through exercise of the pardon. If perjury before Congress and contempt of Congress are pardonable offenses, then it is the President, not Congress, who ultimately determines who can be compelled to give congressional testimony. The balance of powers between the executive and legislative branches would be upset if the President has control over Congress' access to information in this way. Joseph Story adopted this line of reasoning in arguing against the constitutionality of pardons for legislative contempt:

> It would seem to result from the principle, on which the power of each branch of the legislature to punish for contempts is founded, that the executive authority cannot interpose between them and the offender. The main object is to secure a purity, independence, and ability of the legislature adequate to the discharge of all their duties. If they can be overawed by force, or corrupted by largesses, or interrupted in their proceedings by violence, without the means of self-protection, it is obvious, that they will soon be found incapable of legislating with wisdom or independence. If the executive should possess the power of pardoning any such offender, they would be wholly dependent upon his good will and pleasure for the exercise of their own powers. Thus, in effect, the rights of the people entrusted to them would be placed in perpetual jeopardy. The constitution is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to

97. *See* Adams v. Maryland, 347 U.S. 179, 183 (1954); McGrain v. Daugherty, 273 U.S. 135 (1927); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). In the early nineteenth century, compliance with an order compelling attendance was secured by an officer of Congress itself, as shown by the *Anderson* case. Today, as a practical matter, Congress has delegated enforcement of its contempt power to the other two branches by codifying contempt as a statutory misdemeanor. *See* 2 U.S.C. § 192 (1994). That is, contemnors against Congress are prosecuted by the executive branch before judges of the judicial branch.

> punish for contempts. The latter arises by implication; and to make it effectual the former is excluded by implication.[98]

Story's argument is powerful, and some early Attorney General opinions follow his reasoning in suggesting that contempt of Congress is an implied exception to the pardoning power.[99]

There have been no federal or state court cases directly considering whether legislative contempt is a pardonable offense. In the case of *The Laura*, the Supreme Court hinted that the pardon power does not extend to "fines . . . imposed by a co-ordinate department of the government for contempt of its authority."[100] However, the decision in *Grossman*, finding criminal contempt to be a pardonable offense, seems to override *The Laura* on this point and poses some problems for Story's argument.[101] One of the factors that weighed in the *Grossman* Court's opinion was the long-standing practice of granting pardons for judicial contempt, with no executive abuse sufficient to provoke a judicial challenge.[102] Nothing approaching this level of precedent exists with respect to legislative contempts. At the federal level, there has apparently been only one instance of a pardon for contempt of Congress, granted to Dr. Francis Townsend in 1938.[103] This single case, apparently uncontested in the courts, hardly establishes a pattern or practice of constitutional dimensions.

More problematic is the *Grossman* Court's rejection of the balance of powers argument that pardon for contempt of court would tend to destroy the independence of the judiciary.[104] Addressing this holding, several commentators have argued that pardons for contempt of Congress must therefore also be permissible. A pardon for legislative contempt is no more violative of separation of powers, the argument goes, than is a pardon for judicial contempt.[105] In a further analogy to *Grossman*, W.H. Humbert posits, "would not a contempt of Congress appear to be as much an

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98. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 353 (Fred B. Rothman & Co. ed., 1991) (1833).

99. *See* Power of the President to Remit Fines Against Defaulting Jurors, 4 Op. Att'y Gen. 458, 460-61 (1845) (citing Rawle and Story); Courts-Martial, 2 Op. Att'y Gen. 286, 289 (1829) (suggesting a possible exception to pardoning power for contempts of Congress).

100. The Laura, 114 U.S. 411, 413 (1885).

101. *See supra* notes 76, 101-80 and accompanying text.

102. *See Ex parte* Grossman, 267 U.S. 87, 122 (1925).

103. *See* SURVEY OF RELEASE PROCEDURES: PARDON, *supra* note 60, at 141. Dr. Townsend was the leader of a popular movement to establish a flat-rate monthly payment to all persons over the age of 65. His petitions garnered millions of signatures and ultimately contributed to the establishment of social security. In 1938, he was called to testify before a congressional investigating committee on aging. After several days of testimony, during which he was asked some peculiar questions, including whether he encouraged the sentiment that he was the embodiment of Jesus Christ and whether he knew that an associate of his was accused of having kissed an Indian squaw in public (!), Townsend refused to answer any further questions and walked out on the committee. He was found in contempt for this refusal to testify. *See generally* Townsend v. United States, 95 F.2d 352 (D.C. Cir. 1938).

104. *See supra* notes 76, 101-80 and accompanying text.

105. *See* SURVEY OF RELEASE PROCEDURES: PARDON, *supra* note 60, at 140-41; HUMBERT, *supra* note 56, at 61.

offense against the United States as a criminal contempt of Court?"[106] More recently, William Duker somewhat regretfully acknowledges that *Grossman* inescapably leads to the conclusion that contempt of Congress is pardonable.[107]

There are, however, good reasons for distinguishing *Grossman* from the case of legislative contempt. Through means of impeachment, Congress exercises a direct check on presidential power that is absent from the powers of the judicial branch. Balance of powers concerns are therefore greater when a President intrudes upon the inherent powers of Congress. Impeachment is Congress' final trump card; it is the only constitutional check on the pardon power, the only means through which a President who has abused the pardon power may be removed.[108] If impeachment is to be a meaningful option in times of crisis, Congress must have the ability to investigate and, if necessary, coerce testimony from witnesses. If the sole witnesses to presidential misconduct are his accomplices, then Congress may have no way of determining whether an impeachable offense has been committed if the President pardons those who refuse to testify. Thus, allowing pardons for contempt of Congress could subvert the ultimate check on the executive. This is a more serious concern than possible intrusion upon the independence of the judiciary through pardon of judicial contempts, which, after all, could also be remedied by impeachment.

In textual terms, to satisfy Humbert's argument about the definition of "offenses against the United States," the exception for legislative contempt can be read into the impeachment exception in the Pardon Clause.[109] Article II, section 2, which excepts "Cases of Impeachment" from the pardoning power, should not be narrowly construed as limited strictly to offenses leading to impeachment.[110] It is better interpreted as preventing executive interference with impeachment proceedings. The exception applies equally to the actual impeachment determination as to the case of a pardon granted for contempt or perjury committed in the course of an impeachment proceeding. The Constitution allows a President to grant pardons "except in Cases of Impeachment,"[111] and here the preposition "in" is all-important. A pardon granted to a contemnor against Congress might not be *for* the impeachable offense, but nevertheless would occur *in* a case of impeachment, if the contempt was committed during the course of impeachment proceedings. Thus, from a textual perspective, the Constitution appears to bar not only pardons for impeached officials themselves, but also for any witnesses called to testify during the impeachment proceedings.

The purpose behind the impeachment exception supports such a construction of the pardon clause. In *The Federalist No. 69*, Alexander Hamilton explained that the exception was to discourage official misconduct at the highest levels:

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106. HUMBERT, *supra* note 56, at 61-62.

107. *See* Duker, *supra* note 3, at 529.

108. See *infra* notes 140-44 and accompanying text for a discussion of abuse of the pardoning power as an impeachable offense.

109. U.S. CONST. art. II, § 2.

110. *Id.*

111. *Id.*

> Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty, than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed that the person who was to afford that exemption might himself be involved in the consequences of the measure, and might be incapacitated by his agency in it from affording the desired impunity?[112]

In other words, the impeachment exception inhibits misconduct in two ways. First, it allows Congress to impeach the official directly. Second, it decreases the chance that a President will be able to grant pardons to his accomplices, since he may himself be impeached as a consequence of his participation in the wrongdoing, and will be powerless to prevent his own removal from office. Clearly, both of these disincentives would be undermined if a President could obscure relevant information by pardoning all those held in contempt of Congress for refusing to testify. For this reason, the courts would be fully justified in distinguishing *Grossman* and finding that legislative contempt fall outside of the pardoning power. The same arguments apply to perjury before Congress.

It should be noted here that this argument applies only to contempt committed against the House of Representatives, since the House has the sole power to impeach.[113] The House must have the ability to fully inform itself in order to ascertain whether impeachment is justified. Therefore, all testimony before the House should be unprotected by the pardon power. With respect to the Senate, the bar against pardoning legislative contempt would probably apply only to contempt committed in the course of the actual trial following impeachment.[114]

If one accepts this reasoning, then a President has no power to prevent the House from coercing testimony, even from someone who has received a presidential pardon. The only restriction on the House is that the questions posed be related to a topic within the legislative competence of Congress.[115] This is a weak restriction; Congress deals with a great many subjects, and the breadth of testimony taken before Congress is correspondingly wide. In most cases where there would be a danger of a President using a pardon to cover up information, compelling testimony before the House from the witness would be amply justified on the grounds of investigating whether to begin impeachment proceedings. This is true even after a

112. THE FEDERALIST NO. 69, at 419 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

113. *See* U.S. CONST. art. I, § 2, cl. 5.

114. For a similar differentiation between the House and Senate, see Akhil Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 660 (1996).

115. *See* Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) ("[W]e are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.").

President has left office, for impeachment could still be pursued in order to strip him of his pension and entitlements.[116]

D. A Pardon Remits Only Punishment for an Offense, Not Any Other Consequences of the Offense

Courts have been more willing to restrict the effects of a pardon than they have to limit the instances in which the executive may exercise the power. The nineteenth-century view that a pardon "blots out of existence the guilt" of the offender has been replaced by a rough consensus that a pardon only remits punishment for an offense. Numerous effects of guilt, ranging from disbarment, harsher sentencing for subsequent offenses, and existence of a criminal record, have been sustained notwithstanding a pardon.

In *United States v. Wilson*,[117] the first case relating to the effects of a pardon, Chief Justice Marshall stated that a pardon "exempts the individual, on whom it is bestowed, from the *punishment* the law inflicts for a crime he has committed."[118] This formulation, limiting the scope of a pardon to punishment, was significantly broadened in the Reconstruction era. As Congress sought to impose various sanctions on those who had supported the Confederacy, despite President Johnson's amnesty of most Confederate sympathizers, the Court was directly confronted with the question of the pardon power's scope. In *Ex parte Garland*, the Court gave an expansive interpretation to the President's power:

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.[119]

In contrast to Chief Justice Marshall's limited language about the punishment for an offense, the *Garland* Court speaks not only of "penalties," but also of "disabilities;" not only of mitigating punishment, but disposing of the underlying guilt altogether. The line drawn here is not whether an effect is punitive in nature, but simply whether it stems from guilt or conviction of the crime. Under this view, the pardon establishes the "factual" innocence of the offender as well as his "legal" innocence.

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116. Although rare, post-resignation impeachments are not unknown. In 1876, Secretary of War William Belknap was impeached — though not convicted — following his resignation. *See* Boudin, *supra* note 4, at 36 n.184.

117. 32 U.S. (7 Pet.) 150 (1833).

118. *Id.* at 160 (emphasis added).

119. *Ex parte* Garland, 71 U.S. 333, 380-81 (1866).

This definition of pardon leads to some odd results. For example, suppose a surgeon operates while inebriated. The patient dies, and the surgeon is convicted of manslaughter, but subsequently pardoned. According to *Garland*, any and all disabilities flowing from conviction are removed: not only is his punishment remitted, but he must be treated as if he factually had never committed the crime. Presumably, the surgeon could not be deprived of his license and thus prevented from operating in the future.[120] Professor Samuel Williston rejected the notion that these bizarre effects flow from a pardon in his seminal article, "Does a Pardon Blot out Guilt?"[121] After careful review of English and American case law on the subject, Williston criticized *Garland* and concluded that

> [t]he true line of distinction seems to be this: The pardon removes all legal punishment for the offense. Therefore, if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.[122]

Williston's article has been influential, and his distinction between punishment and nonpunitive qualifications has been widely adopted. Most subsequent cases in federal as well as state courts follow his reasoning, many of them citing directly to the article.[123]

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120. *See In re* Abrams, 689 A.2d 6, 10-11 (D.C.) (en banc), *cert. denied*, 117 S. Ct. 2515 (1997).

121. Samuel Williston, *Does a Pardon Blot out Guilt?*, 28 HARV. L. REV. 647 (1915).

122. *Id.* at 653. Williston's thesis, it should be observed, is not without its vagaries. He articulates at least two possible theories for the effect of a pardon. First, he asserts that pardon removes the "legal punishment for the offense." This is identical to the *Wilson* formulation. Second, he posits that pardon removes all consequences of conviction, but not consequences that would have attached to the conduct even without conviction. It is apparent that these are not the same thing; the second formulation is considerably broader. Not all consequences of conviction are necessarily punitive. The first test would bar only punitive consequences of conviction, while the second would bar both punitive and nonpunitive consequences.

An example will illustrate the differences between the two theories. In *Carlesi v. New York*, the Supreme Court held that consideration of a pardoned offense was permissible in determining the sentence for a later offense. Carlesi v. New York, 233 U.S. 51 (1914). The Court reasoned that the additional punishment imposed because the offender was a "habitual criminal" was not punishment for the first offense. Instead, the Court found that the first offense was simply evidence of the offender's status as a habitual criminal, which warranted a more severe sentence. The Court concluded that the more severe sentence was in no way punitive with respect to the first, pardoned offense. Yet, plainly it would not have been imposed but for conviction of the first offense. The additional punishment was therefore a nonpunitive consequence of having committed the first offense, and a punitive consequence of having committed the second. Similarly, the existence of a criminal record is not intended to be punitive, but will not come about except upon conviction for a criminal offense. The blurring of these two ideas continues to the present day, as demonstrated by the conceptual confusion in the *Abrams* case. *See infra* notes 127-29 and accompanying text.

123. *See, e.g.*, United States v. Noonan, 906 F.2d 952, 958-59 (3d Cir. 1990); Bjerkan v. United

The Court of Appeals for the District of Columbia recently addressed the issue of whether an attorney could be suspended from practice for perjuring himself before Congress, notwithstanding a subsequent pardon. The case, *In re Abrams*, dealt with one of President Bush's Iran-Contra pardons.[124] Elliott Abrams had been convicted of perjuring himself before three congressional committees relating to the Iran-Contra affair, but was subsequently granted a full and unconditional pardon.[125] Despite the pardon, Abrams was suspended from the practice of law for one year for his misrepresentations to Congress. Citing *Garland*, Abrams argued that the pardon established his *factual* innocence, thus eliminating any legal basis for his suspension from practice. The court decisively rejected Abrams' contention, holding that the pardon "could not and did not require the court to close its eyes to the fact that Abrams did what he did."[126]

The majority opinion characterized the suspension as the enforcement of moral qualifications for bar membership, rather than as punishment for Abrams' misconduct. The *Abrams* court found that its "purpose in conducting disciplinary proceedings and imposing sanctions is not to punish the attorney; rather, it is to offer the desired protection by assuring the continued or restored fitness of an attorney to practice law."[127] Because the pardon could not "reinvest [Abrams] with those qualities which are absolutely essential for an attorney at law to possess," the suspension was beyond the reach of a pardon.[128] The court also argued, somewhat inconsistently, that the pardon does not affect disciplinary proceedings because they are not a consequence of conviction. Since a local or state bar association could "independently determine[] that the underlying conduct, or some portion of it, violated one of its canons of ethics," the sanction did not follow from conviction, but attached to the underlying misconduct directly.[129] Thus, the court found the sanction of suspension beyond the reach of a pardon both because it was non-punitive and because it was not solely a consequence of conviction.

States, 529 F.2d 125, 128 n.2 (7th Cir. 1975), *cert. denied*, 414 U.S. 1022 (1973).

124. *Abrams*, 689 A.2d at 10-11.

125. *See id.*. In light of the conclusion reached in *supra* Part II.3 that contempt and perjury before the House are not pardonable offenses, the validity of Abrams' pardon is questionable. While this issue was not raised in the case, it is arguable that the pardon for perjury interfered with Congress' ability to gather information which may have led to President Bush's impeachment, and thus violated the impeachment exception to the pardon power.

126. *Id.* at 7.

127. *Id.* at 12 (citing *In re* Steele, 630 A.2d 196, 200 (D.C. 1993)).

128. *Abrams*, 689 A.2d at 7 (citing *In re* Lavine, 41 P.2d 161, 163 (Cal. 1935)). While the court held that the pardon did not remove the basis for imposing disciplinary sanctions for the underlying misconduct, a majority of the court did not concur in the severity of the sanction, and Abrams was ultimately publicly censured, not suspended from practice. *See id.* at 24-25.

129. *Id.* at 16. While conviction of a crime of sufficient seriousness often constitutes a per se violation of bar codes of ethics, *see, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1995) (classifying as professional misconduct the commission of a criminal act that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"), conviction is not usually a prerequisite for disciplinary action. Codes of professional conduct often penalize conduct that is not itself criminal.

The holding in *Abrams* is adequately grounded in Supreme Court precedent. In *Carlesi v. New York*,[130] the Court held that a court may take into account a prior offense when sentencing a criminal, even if that offense had been pardoned.[131] Although the more severe sentence was plainly a consequence of conviction for the pardoned offense, the Court nevertheless held that the additional increment of punishment was not punitive with respect to the first offense, but merely reflected a state judgment that the offender was deserving of a harsher penalty for the second offense.[132] More recently, in *Nixon v. United States*,[133] the Court found that "the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is an executive action that *mitigates or sets aside punishment* for a crime."[134] Viewed together, *Carlesi* and *Nixon* represent the Supreme Court's return to its original, more limited understanding of the effects of a pardon set forth by Chief Justice Marshall in *Wilson*.

A person who perjures himself before a grand jury or before Congress, confident he will receive a pardon, must therefore contend with the fact that not all consequences of his crime will be extinguished by the pardon. In fact, there are many harmful effects. As Elliott Abrams found out, an attorney could be disbarred or otherwise sanctioned by a bar association.[135] Disqualification from other occupations by state licensing agencies is also possible.[136] The existence of a criminal record documenting one's conviction is not expunged by a pardon.[137] Following from that, evidence of one's criminal history would probably be admissible for the purposes of impeachment of testimony under the Federal Rules of Evidence.[138] Furthermore, as a convicted criminal, the offender would in some cases be subject to more severe punishment under recidivist statutes, and the conviction could count as a "strike" for the purposes of "three-strikes-and-you're-out" laws.[139] In addition, the offender may be ineligible for military service.[140]

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130. 233 U.S. 51 (1914).

131. *Id.* at 59.

132. *See id.* at 57-59.

133. 506 U.S. 224 (1993).

134. *Id.* at 232 (citing BLACK'S LAW DICTIONARY 1113 (6th ed. 1990)) (emphasis added). The case bears no relation to former President Nixon, but rather to a chief judge of a federal district court who unsuccessfully challenged the procedure by which he was impeached by Congress.

135. In addition to *Abrams*, a number of state courts have also come to this conclusion. *See, e.g., In re* Lavine, 41 P.2d 161 (Cal. 1935); Nelson v. Commonwealth, 109 S.W. 337 (Ky. 1908); *In re* Bozarth, 63 P.2d 726 (Okla. 1936).

136. *See* Bjerkan v. United States, 529 F.2d 125, 129 (7th Cir. 1975) (Fairchild, J., dissenting).

137. *See* United States v. Noonan, 906 F.2d 952, 960 (3d Cir. 1990).

138. *See Bjerkan*, 529 F.2d at 129; *cf.* Boyd v. United States, 142 U.S. 450 (1892) (holding pardon restored competency to testify). The distinction here is that, while pardon restores competency to testify, evidence of prior convictions could still be used to impeach the credibility of the witness, despite the fact of a pardon for those offenses.

139. *See* Carlesi v. New York, 233 U.S. 51 (1914) (upholding the sentencing of a defendant as a second offender, notwithstanding that he had been pardoned for the first offense).

140. *See* Effect of Pardon on Statute Making Persons Convicted of Felonies Ineligible for Enlistment in the Army, 39 Op. Att'y Gen. 132 (1938); Army — Enlistment — Pardon, 22 Op. Att'y Gen. 36, 37 (1898).

In sum, any sanction by the state that could be characterized as regulatory rather than punitive will be unaffected by the pardon.

The threat of these negative consequences may be insufficient to prevent an official from perjuring himself at the President's behest. But again, the same could be said of contempt or any criminal penalty imposed for perjury. What is important is that a pardon does not place a perjurer in the same position he would have been in had he never committed the crime. In that the residual consequences of conviction are serious disabilities, even if they are not styled "punitive" in nature, potential perjurers may be dissuaded from committing crimes to conceal information even in the expectation of a pardon.

E. Political Checks of Electoral Accountability and Impeachment Discourage Abuse of Executive Clemency

From a public relations perspective, the coverup is often worse than the scandal. A President seeking reelection has a strong disincentive to grant pardons that would be perceived as attempts to hide information. Even second-term Presidents, though no longer directly accountable through the electoral process, want to maintain high approval ratings and set the stage for election of their chosen successor. The power of history should also not be discounted: which President wants to go down in the history books as the one who abused the pardon power for personal gain? These mechanisms will not always ensure accountability, of course. It is worth noting that President Ford may have cost himself the 1976 election by pardoning Nixon,[141] and he did it nevertheless.

Impeachment is a more substantial check on presidential abuse of executive clemency. Chief Justice Taft relied on impeachment as the appropriate remedy for gross abuses of the pardon power.[142] There are at least two instances of state governors being impeached for such corruption. Texas Governor James E. "Pa" Ferguson was impeached in 1917 following a pardon-selling scandal.[143] J.C. Walton, governor of Oklahoma, was impeached in 1923 following numerous pardons of political allies, often for cash.[144]

An outgoing President may have greater temptation to abuse the power — as some have contended President Bush did before leaving office — with little fear that impeachment will cut short his term in office. After all, as Brian Kalt has noted, presidential self-dealing is to be most expected when the President is preparing to leave office and the usual disincentives are of diminished sig-

141. *See* Kobil, *supra* note 18, at 617. Ford's approval rating dropped from 66% before the pardon to 50% following the pardon. *See* Boudin, *supra* note 4, at 2 n.9.

142. *See Ex parte* Grossman, 267 U.S. 87, 121 (1925).

143. Ferguson's wife, Miriam E. "Ma" Ferguson, was elected to the office of governor notwithstanding her husband's impeachment. Ironically, the Texas legislature subsequently tried to pardon "Pa" Ferguson, but the bill was held violative of the Texas Constitution in *Ferguson v. Wilcox*, 28 S.W.2d 526 (Tex. 1930). *See* Coleen Klasmeier, Note, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1535 n.165 (1995).

144. See SURVEY OF RELEASE PROCEDURES: PARDON, *supra* note 60, at 150-53, for a full account of Walton's impeachment.

nificance.[145] Even so, impeachment is still possible following resignation, for the purposes of stripping the impeached official of his pension and entitlements.[146] Even if post-resignation impeachment would be largely symbolic, the infamy of being forever remembered as the President impeached for abuse of the pardon power must weigh heavily on any executive contemplating such abuse. Though these political checks are weakest at the point where abuse of the pardon power is to be most feared — at the end of a second term, or when impeachment seems likely — still the desire to salvage one's popularity and preserve one's image in historical memory will be strong influences.

F. Pardon Abrogates a Witness' Fifth Amendment Privilege Against Self-incrimination

In at least one important respect, a pardon will actually facilitate, not hinder, the disclosure of information. While blocking a trial of the recipient, the same pardon will have the effect of abrogating the recipient's privilege against self-incrimination should he be called as a witness in another trial or before a grand jury or congressional investigating committee.

In *Brown v. Walker*,[147] the Supreme Court held that legislative immunity, if sufficiently broad, dispensed with the Fifth Amendment privilege against self-incrimination.[148] The Court noted that the Fifth Amendment shields only testimony which may lead to a criminal prosecution, not testimony which may be disgraceful or lead to loss of reputation or economic injury.[149] In other words, if one's testimony would not place one in danger of criminal prosecution, then the Fifth Amendment will not protect that testimony. Therefore, the Court held that granting legislative immunity would abrogate the privilege,[150] going on to find that:

> [i]f . . . the object of the [privilege against self-incrimination] be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible — in other words, if his testimony operates as a complete pardon for the offense to which it relates — a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question.[151]

Subsequent cases have significantly redefined the scope of the Fifth Amendment's protection. In *Kastigar v. United States*,[152] for example, the Court held that absolute immunity was not necessary to compel a witness to testify, but that

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145. *See* Brian Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 798-99 (1996).

146. *See supra* note 116.

147. 161 U.S. 591 (1895).

148. *See id.* at 595.

149. *See id.* at 596.

150. *Id.* at 595.

151. *Id.*

152. 406 U.S. 441 (1972), *reh'g denied*, 408 U.S. 931 (1972).

transactional immunity — exclusion of testimony and any evidence gathered as a result of that testimony — would suffice.[153] Still, there has been no deviation from the central principle that a witness may be compelled to testify, so long as he is granted immunity that is co-extensive with the privilege against self-incrimination, however defined.

A pardon is akin to absolute immunity, since an individual cannot be prosecuted for an offense once pardoned for that offense. Thus, the Court in *Brown* stated in dicta that, "if a witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offense as if it had never been committed."[154] It should be apparent that, if the lesser transactional immunity suffices to allow the compulsion of testimony, then the absolute immunity provided by a pardon will have a similar effect.

Pardon is distinct from legislative immunity in one other important respect. A pardon carries with it an inference of guilt that is absent from a grant of legislative immunity.[155] In *Burdick v. United States*,[156] the Court used this distinction to find that a person could refuse to accept a pardon.[157] George Burdick was an editor of the *New York Tribune* who invoked his Fifth Amendment privilege and refused to answer before a grand jury certain questions relating to an article on customs fraud. President Wilson pardoned Burdick in an effort to force him to divulge his sources for the article. When he still refused to answer, he was fined for contempt and imprisoned until he would agree to answer the questions. The Court found that "[e]scape by confession of guilt implied in the acceptance of a pardon may be rejected, — preferring to be the victim of the law rather than its acknowledged transgressor — preferring death even to such certain infamy."[158] Although *Burdick* establishes a right to refuse a pardon, it leaves untouched the conclusion that a pardon, once accepted, abrogates the privilege against self-incrimination.

If a pardon accepted removes the privilege against self-incrimination, and a pardon refused keeps it intact, then the timing of acceptance is a potentially important consideration. Could a witness, for example, refuse acceptance of a pardon when testifying before Congress, but then invoke the pardon should he subsequently be tried for an offense? The idea is not as far-fetched as it appears. A pardon is nothing more than a document signed by the President. There is no space at the bottom requiring the recipient to sign it, no "I accept" or "I refuse" box to check. When Burdick "refused" the pardon, he still had in his hand the document stating that he had been pardoned for any offense related to his article on customs fraud.

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153. *See id.* at 448. Some commentators advocate an even narrower reading of the Fifth Amendment. Amar & Lettow, for example, read the Fifth Amendment as requiring immunity only for incriminating testimony itself, not any of the "fruits" of that testimony. *See* Akhil R. Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

154. *Brown*, 161 U.S. at 599.

155. *See* Burdick v. United States, 236 U.S. 79, 94 (1915).

156. 236 U.S. 79 (1915).

157. *Id.* at 94.

158. *Id.* at 90-91.

The idea that there is no acceptance or refusal of a pardon in the abstract, only in the context of specific proceedings, is derived from *Wilson.* In that case, where a prisoner had stated that he did not wish to avail himself of a pardon which had been granted him, the Court held that a pardon, like any other relevant fact, has to be brought "judicially before the court, whether by plea, motion or otherwise."[159] If a pardon is granted before conviction, it might be argued that whether the offender has accepted or rejected the pardon is indeterminate until the moment of pleading, when he must either plead the pardon in bar of his prosecution or fail to do so and face trial. If he were brought before Congress prior to trial, for example, who is to say whether he has accepted his pardon for the purposes of determining his privilege against self-incrimination?

No court case has yet faced this issue, probably because it would only be important in the obscure case of a pre-conviction pardon (which are very seldom granted),[160] where the offender is called to testify before a grand jury or Congress and refuses to accept his pardon, but then tries to plead it in a subsequent criminal prosecution. Still, it may be doubted whether the deed of pardon would remain valid after the recipient rejects it once under oath. An analogy to a conditional pardon might be drawn. Conditions to a pardon may not selectively be consented to; a conditional pardon is an all-or-nothing proposition.[161] Similarly, a pardon recipient cannot pick and choose the occasions on which he wants to invoke the pardon, using it when it is to his advantage but keeping it in his pocket when it might force him to testify. Consider also the games that a pardon recipient could engage in — refusing to use his pardon prior to conviction in the hopes that he will be acquitted at trial, but then invoking it after conviction to avoid punishment if he should happen to be convicted. It seems probable that either Congress or a grand jury would be able to force a pardon recipient to decide whether to accept or reject a pardon when they call him to testify, even prior to trial.

The President is thus in a quandary when he wants to use the pardon power to help a witness remain silent. On one hand, granting the pardon eliminates the possibility of a trial and the potential disclosure of information during the course of the trial. However, the very same pardon exposes the witness to contempt for refusing to testify should she be called before a grand jury or Congress, where that testimony might have been shielded by the Fifth Amendment before the pardon. The pardon eliminates the possibility of extracting information in one forum, but facilitates its extraction in other forums.

III. Abuses of the Pardon Power Revisited

By way of summary, it might be helpful to revisit the cases of Nixon, Weinberger, McDougal, and Lewinsky to see exactly what effect the pardons (or, in the

159. United States v. Wilson, 32 U.S. 150, 161 (1833).

160. Only three out of a total of 2314 pardons during the Kennedy, Johnson, and Nixon administrations were granted before conviction. *A Pardon for Nixon and Watergate Is Back,* CONG. Q. WKLY., Sep. 14, 1974, at 2458.

161. *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1242 (D.D.C. 1974).

latter two cases, hypothetical pardons) had or could have had on disclosure of information. Each of these cases illustrates that the pardon, by itself, cannot operate to prevent disclosure of information. In each instance, there were methods of compelling disclosure that were not impacted by the pardon. The failure to obtain information was the result of a lack of political will to utilize these other mechanisms, not because of the pardon enabling the offender to remain silent with impunity.

A. Richard Nixon

If it was believed that the full story of Watergate had yet to be revealed at the time of Nixon's pardon, Congress might have created a committee to investigate, for example, whether additional congressional oversight legislation was necessary. President Nixon could have been called to testify before this committee, and the pardon would in no way have protected him. If he refused to testify, he could have been held in contempt of Congress, which, as I have suggested, President Ford would have been unable to pardon. Even if it was within President Ford's power to pardon contempt against Congress, a second pardon would have been necessary, since the first applied only to acts committed while Nixon was President. In view of public suspicion that there was a deal between Nixon and Ford, and the widespread disapproval of the first pardon, it seems highly unlikely that a second pardon for perjury or contempt would have been forthcoming.

Even if President Ford had been willing to continue to protect Nixon, the possibility of impeaching President Nixon to strip him of his pension and entitlements remained open. One might have expected much the same testimony and witnesses in the impeachment proceedings as would have occurred during any criminal trial. And, as I have suggested, the impeachment exception to the pardon power bars pardons not only for impeached officials, but for witnesses called to testify in impeachment proceedings.

Thus, Congress was not left powerless by President Ford's pardon of Nixon. The failure to obtain the full story of Watergate, if that is what happened, was a failure of political will to use the full powers available to Congress, not a breakdown in the balance of powers.

B. Caspar Weinberger

Lawrence Walsh was simply wrong that President Bush blocked further investigation into the Iran-Contra affair by pardoning Caspar Weinberger.[162] If Walsh believed that the trial would have revealed the full scope of President Bush's involvement in the scandal, then why not simply call Weinberger before a grand jury to investigate Bush? Walsh apparently was aware of this possibility, but it was never pursued. The pardon would not have protected Weinberger against a civil contempt citation if he had refused to testify. Furthermore, since Bush would have been out of office by the time Weinberger was called to testify, a second pardon for

162. *See supra* notes 29-35 and accompanying text.

Weinberger if he perjured himself would not likely have been granted by President Clinton.

Alternatively, Weinberger could have been called by Congress to testify about President Bush's knowledge of the Iran-Contra affair. Congress could have justified such proceedings as necessary to determine whether to begin impeachment proceedings against President Bush. As in President Nixon's case, the fact that President Bush had already left office would not have barred impeachment to strip him of his pension and entitlements. Again, the failure to extract information from Caspar Weinberger was a political failure to utilize the available alternatives to a criminal trial.

Finally, the pardon of Weinberger could have backfired, insofar as the pardon stripped him of his privilege against self-incrimination. As Brian Kalt has noted, the pardon was risky, and it paid off for political reasons, not constitutional ones.[163]

C. Susan McDougal

Speculation that President Clinton could have used a pardon to "spring felon Susan McDougal for her services protecting the Clintons from the truth"[164] was off the mark. Ms. McDougal was sentenced to two years imprisonment for fraud as well as up to seventeen months for a contempt citation for refusing to answer certain questions before a grand jury relating to the Clintons' Whitewater affairs.[165] President Clinton could have pardoned her fraud conviction, but he was powerless to "spring" her for the civil contempt citation. Although her imprisonment for contempt was for a determinate period of time, her contempt would have been purged at any time if she had agreed to answer the questions posed to her by the grand jury.[166] According to the *Shillitani* case, this makes the contempt civil rather than criminal.[167] As explained above, a pardon may not be granted for a civil contempt.

Even if her contempt were considered criminal, double jeopardy would not have prevented her from being cited for civil contempt and recommitted to prison on an indeterminate sentence had she been pardoned. And even if the foregoing conclusion is mistaken, and Clinton could have secured her release through a pardon, this still would not have shielded her entirely. The grand jury could have again posed questions to her, and any intransigence on her part would not have been covered by the pardon; a future contempt citation could not be covered in a pardon for previous contempts. Clinton might issue successive pardons, but an all-out battle between the President and the courts, with the President blatantly using his powers to conceal information, would have put him in a politically unenviable situation, to

163. *See* Kalt, *supra* note 145, at 799.

164. William Safire, *Clintons, Pardons Set New Nightmare*, SAN ANTONIO EXPRESS-NEWS, Sept. 27, 1996, at B5, *available in* 1996 WL 11498688.

165. *See Starr Says Noncooperation Impeding Whitewater Probe*, WASH. POST, Nov. 12, 1996, at A6.

166. *See Pardon Me*, WALL ST. J. Sep. 25, 1996, at A22.

167. *See* Shillitani v. United States, 384 U.S. 364 (1966); *see also supra* text accompanying note 75.

say the least. In any case, such use of the pardon power could only have continued so long as Clinton held office.

D. Monica Lewinsky

As noted above, Andrew Shapiro advocated a pardon for Monica Lewinsky on the theory that she would not have had to tell special prosecutor Kenneth Starr anything following such a pardon.[168] Recall the background leading up to this proposal: Lewinsky had testified under oath, but Kenneth Starr suspected she had not been entirely truthful and wished to depose her again. This placed Lewinsky in a bind; if she changed her story, she risked being prosecuted for perjury for her initial testimony. However, she could have invoked the Fifth Amendment upon being deposed again, refusing to answer questions on the basis that her answers could have incriminated her.

Let us examine what would have happened had she been pardoned for any offenses, such as perjury, committed during her initial testimony. No longer under threat of a perjury prosecution, all the incentives would be on her to tell the truth — which is, according to Shapiro, just what the President would have wanted to conceal. He hypothesized that, if called before a grand jury, Lewinsky could have been evasive or might have suffered a convenient lapse of memory with impunity.[169] Why this would have been so is unclear; her Fifth Amendment privilege abrogated by the pardon, Lewinsky would have been compelled to testify truthfully. Any "memory lapses" would have been belied by her first deposition. Had she been pardoned, she couldn't have been prosecuted for perjury committed during her first deposition, but nothing about the pardon could have prevented use of that testimony offered as evidence in a trial for a subsequent commission of perjury.

Shapiro's second point, that a pardon would have stripped Starr of his only bargaining chip, the promise of immunity, falls equally flat. Having been pardoned and thereby having lost her Fifth Amendment immunity, Lewinsky could have been compelled to testify under threat of contempt without the need for an offer of immunity. As things turned out, Lewinsky was granted immunity on July 28, 1998. The "bargain" was, in essence, granting Lewinsky immunity in return for her agreeing not to invoke the Fifth Amendment. Had she been stripped of this protection by a pardon, Starr would have needed no "bargaining chip" at all.

Far from enabling the President to conceal information, a grant of pardon in this instance would have actually facilitated Starr's investigation. Clinton did well not to pardon her, if he was seeking to prevent disclosure of embarrassing facts.

Conclusion

Witnesses will lie, conspirators will remain silent, and accomplices will even sit in prison rather than reveal information. Nothing can ensure that complete, truthful information will be extracted from those who know it. Weighing the balances, some

168. *See* Shapiro, *supra* note 44.
169. *See id.*

will always prefer the sanction to whatever detriment they perceive disclosure will cause them.

The pardon power exacerbates none of these problems. Civil contempt and contempt of Congress are beyond the reach of the pardon power, and are adequate to assure Congress' and the courts' ability to compel testimony. The political checks on abuse of the pardon power are real, and the use of pardon to cover up information will be tempered by the fact that the pardon abrogates a witness' privilege against self-incrimination. If our system does not adequately obtain information, especially in cases of high executive misconduct, then our attention should be focused on the political will to use available means to extract that information, not on the illusory power of executive clemency to conceal it.